United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1005

ORIGINAL WITH AFFIDAVIT OF MAILING

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 77-1005

B
P/S

UNITED STATES OF AMERICA,

Appellee,

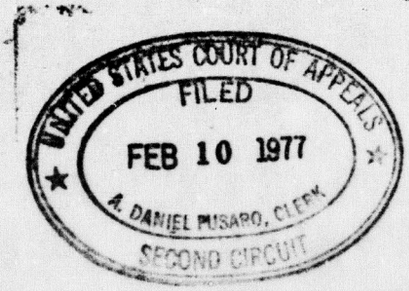
-against-

PETAR MATANIC,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT



MARTIN ELEFANT, Esq.
16 Court Street
Brooklyn, New York 11201
(212)624-2240

PAUL B. BERGMAN, Esq.
25 Broadway
New York, New York 10004
(212)269-4900

Attorneys for Defendant-Appellant
Petar Matanic

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES

MISCELLANEOUS

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 77-1005

UNITED STATES OF AMERICA,

Appellee,

-against-

PETAR MATANIC,

Defendant-Appellant.

BRIEF OF APPELLANT

Preliminary Statement

Appellant Petar Matanic appeals from an order of the United States District Court for the Eastern District of New York (Bartels, J.), entered December 27, 1976, which order denied Matanic's motion for release from custody pursuant to the Speedy Trial Act of 1974.[1/] Matanic, who has been in continuous custody since September 12, 1976, when he was arrested, claimed that the provisions of 18 U.S.C. §3164(c) required his

---

1/ This Court has already entertained appeals from orders which deny release under the Speedy Trial Act. See United States v. Martinez, 538 F.2d 921 (2d Cir. 1976).

release pending trial of the charges against him.

Section 18 U.S.C. §3164 provides:

> "(a) During an interim period commencing ninety days following July 1, 1975 and ending on the date immediately preceding the date on which the time limites provided for under section 3161(b) and section 3161(c) of this chapter become effective, each district shall place into operation an interim plan to assure priority in the trial or other disposition of cases involving --
>
> (1) detained persons who are being held in detention solely because they are awaiting trial, and
>
> (2) released persons who are awaiting trial and have been designated by the attorney for the Government as being of high risk.
>
> (b) During the period such plan is in effect, the trial of any person who falls within subsection (a)(1) or (a)(2) of this section shall commence no later than ninety days following the beginning of such continuous detention or designation of high risk by the attorney for the Government. The trial of any person so detained or designated as being of high risk on or before the first day of the interim period shall commence no later than ninety days following the first day of the interim period.
>
> (c) Failure to commence trial of a detainee as specified in subsection (b), through no fault of the accused or his counsel, or failure to commence trial of a designated releasee as specified in subsection (b), through no fault of the attorney for the Government, shall result in the automatic review by the court of the conditions of release. No detainee, as defined in subsection (a), shall be held in custody pending trial after the expiration of such ninety-day period required for the commencement of his trial. A designated releasee, as defined in subsection (a), who is found by the court to have intentionally delayed

> the trial of his case shall be subject to an order of the court modifying his nonfinancial conditions of release under this title to insure that he shall appear at trial as required."

The charges against Matanic are, admittedly, among the most serious in the Federal criminal code. He is charged in two counts with air piracy, one of which charges that a death resulted from the hijacking (49 U.S.C. §1472(d)). The third count in the indictment charges conspiracy to commit hijacking (18 U.S.C. §371).[2/]

The central issue on this appeal is, can it be said that Matanic (or any of the co-defendants, for that matter) is at "fault" - as that term is to be defined under §3164(c) - in delaying the trial. It is, apparently, the government's view that Matanic was at "fault" because one cause for the inordinate delay was the defendants' successful motion in the District Court to dismiss the two major counts of indictment for lack of venue. (Decision and Order of Bartels, J., November 22, 1976).[3/] Not content to simply (and immediately) reindict the defendants in a district of unquestioned venue when notice of the defendant's claim was first given on October 27, the government chose to stand fast. The result of that decision was to utterly stall this prosecution in every conceivable respect since November 22,

---

2/ Matanic's co-defendants, Zvonko Busic, Julienne Busic, Frane Pesut and Mark Vlasic, are named as defendants in all counts of the indictment.

3/ On January 27, 1977, this Court reversed Judge Bartels' decision and remanded the case for trial (United States v. Busic, 2d Cir. Slip. op. 1583; Dkt. No. 76-1552). Trial has now been set for March 14, 1977.

when Judge Bartels granted the defense motion.

The government apparently also takes the position that because some of the defense lawyers at an early stage of the proceedings voiced the opinion that the defendants would need additional time to prepare their respective cases, that the mandated trial requirement of §3164 has, in some fashion, been put to rest.

Issue Presented for Review

Was the appellant denied his right to a trial within 90 days of his arrest under 18 U.S.C. §3164(c) where the "fault" for the delay was due to the government's failure to choose, for indictment, a forum with unquestioned venue over all the offenses; and where the government studiously avoided representing at any point that it was, in fact, finally ready to try the case.

Statement of the Case

Herewith is a chronology of the prosecution against appellant Matanic.

September 12, 1976

Appellant arrested at JFK International Airport and placed in Federal custody which has been continuous since then.

September 13, 1976

Appellant arraigned in E.D.N.Y., CJA counsel, Martin Elefant, Esq. appointed by Magistrate to represent appellant.

September 21, 1976

Indictment filed.

September 27, 1976

Appellant arraigned on indictment before District

Judge Bartels and pleads not guilty; counsel for Zvonko Busic requests a two-week adjournment on behalf of all defendants, including appellant, for purpose of obtaining retained counsel (Tr. of September 27, 1976; p. 13). The requested adjournment is granted to October 13 but the Court advises counsel that the adjournment cannot interfere with the Court's obligation to "see these defendants get a speedy trial within three months of their incarceration..." (id, at p. 15). Significantly, as of the day of pleading, the government is advised by defense counsel for Julienne Busic (David Rudolf) that "There may be venue motions or motions to dismiss on constitutional grounds" (id., at p. 19). Finally, the government does not indicate that it is ready for trial.

October 13, 1976

New counsel are substituted for Zvonko Busic (Michael Tigar) and Mark Vlasic (Nancy Rosner) (Tr. of October 13, 1976; p. 3). October 27 is set as the last day for defense motions respecting bail. The government is given until November 3 to respond and the bail hearing is set for November 8. In addition, counsel for Busic - adverting to prior discussions he has had with the government on the matter - states that a venue motion will also be made (id., at p. 6).

There is also discussion between counsel for Busic and the Court respecting the 90 day trial requirement under the Speedy Trial Act and, while there is some general talk about the defendant's waiving their speedy trial rights, counsel for appellant does not participate. Moreover, no waivers are

tendered in view of counsel's optimism on the success of the bail motion (Mr. Tigar: "It had been my intention, Your Honor, to argue the bail motion in such a fashion that I could convince the Court, and in that way we would not fact the problem of incarcerated defendants." [id., at p. 8] 4/

The trial date is fixed for December 6.

The government does not indicate that it is ready for trial.

October 18, 1976

All counsel are notified that defense motions must be submitted by November 8 and the government's responses by November 15. (See letter from Assistant U.S. Attorney Thomas R. Pattison dated October 18, 1976).

October 26, 1976

The Court directs that venue motions be filed by noon, October 27 and that opposition papers be filed on November 4 at noon. A hearing is set for November 8.

October 27-28, 1976

Timely venue and bail motions filed by counsel for Zvonko Busic, joined in by appellant Matanic (Tr. of October 28, 1976; p. 5).

4/ Counsel for Busic also remarked that a waiver might be forthcoming in view of the number of potential witnesses in the case (id., at 9) and the government acknowledges that "There must be a personal waiver under the new act" (id, at p. 13) as does the Court (id.), remarking that if there is no personal wiaver the trial will be held on December 6 (id., at p. 14).

November 3, 1976

An ex parte letter on behalf of appellant is written pursuant to 18 U.S.C. §3006 A(e)(1), requesting, inter alia, the appointment on appellant's behalf of an investigator under CJA.

November 4, 1976

In a letter, the government requests a four day extension until November 8 to respond to the dismissal motion based on improper venue because of the "complexity of the issue" and "practical considerations" require "further intensive review". (See letter from Assistant U.S. Attorney Pattison to Judge Bartels, November 4, 1976.)

November 8, 1976

Appellant Matanic's motions for discovery and inspection and particulars are timely filed.

November 10, 1976

Argument held on venue and bail motions. As to the venue motion, the Court reserved decision; the motion to reduce the 1 million dollar bail for each defendant was denied.

Once again, the government did not state that it was ready for trial. Indeed, it indicated quite to the contrary when, in response to a defense counsel's comment on the government's motion to take hair samples from the defendant, it stated that "The [grand] jury is still looking into the facts here".[5/]

5/ Based on this comment, counsel for Busic subsequently moved on November 22 for dismissal because of the apparent improper use of the grand jury following the indictment. The government has not, to this day, responded to that motion.

November 22, 1976

The government's response to appellant Matanic's motions for discovery, inspection and particulars is filed one week late.

On the same day, Judge Bartels dismissed, on grounds of improper venue, the first two counts in the indictment.

November 23, 1976

The government files a protective notice of appeal from the order of dismissal.

November 24, 1976

On this date, all sides appeared before Judge Bartels to determine the future progress of the prosecution which, because of the dismissal of counts one and two, was left with only the conspiracy count. The government moved for a stay of the order of dismissal which, over the defense opposition (Tr. November 24, 1976; pp. 5-13) was granted until December 3.[6/]

In response to the Court's inquiry, the government stated that it had no intention of trying the conspiracy count alone and would await the decision of this Court. In effect, as it readily conceded, the government was asking for an extension of time to try the conspiracy count (id., at p. 15).

Moreover, in response to the obvious delay which was being caused by its decision to prosecute an appeal, the govern-

---

6/ On December 6 the stay was extended indefinitely, pending the outcome of the appeal.

ment completely abandoned any notion that it had to be ready for trial. Instead, the government - turning the Speedy Trial Act on its head - took the position that it was not required to be ready for trial until the defendants were ready. Moreover, in supporting that position, the government pointed to the previous discussions in which some of the defense counsel had indicated that their clients would be prepared to execute waivers of the Speedy Trial Act's provisions (id., at p. 21).[7/]

December 6, 1976

On this day, the day set for trial, all sides again appeared. In response to questioning, the government acknowledged that it was "taking procedures in Buffalo so that in the event the appeal is adverse to the United States Government we can proceed as quickly as possible without delay" (Tr. December 6, 1976; pp. 6-7). Once again, though, the government maintained that it would not prosecute the pending conspiracy charge alone[8/] and, even though the entire indictment was concedely triable in the Northern District of New York, the government rejected that alternative as well: "The only reason we are appealing, with all due respect to you, Your Honor, we think you are wrong..." (id., at 15).

7/ Of course, we concede that the government was quite correct in its assertion that the defendants were not ready for trial. The government had just recently provided partial discovery but had not completed it; appellant Matanic's request for a CJA investigator had not been granted; and none of the motions, apart from bail and venue had been decided.

8/ Counsel for Zvonko Busic, speaking for all defendants, stated that the defense was not moving for a continuance and was ready to try the conspiracy charge, but not the capital charges (id., at pp. 9-11).

The following colloquy then occurred:

MR. BERGMAN: I believe the Speedy Trial Act would require the release of these defendants [90] days after their arrest. The fact that the Government is pursuing an appeal when it is clear there is venue in either one or probably two other districts in this state, and implying to the prosecution in this case ought not be to the detriment of these defendants.

* * * * *

THE COURT: Are you suggesting that they have no right to appeal and shouldn't have appeal --

MR. BERGMAN: They have the right to appeal. I am questioning whether or not the Government ought to be appealing this case when it has jurisdiction --

THE COURT: That's not for you to decide. The Government has a right to appeal.

MR. BERGMAN: And we are still entitled to the provisions of the Speedy Trial Act.

THE COURT: Yes, after taking into account excludable periods. I think it is rather clear that under the act the plan -- and under the act that when an appeal of this kind has been made and a stay granted that that is an excludable period to be deducted from the time to be [computed] in determining the speedy trial.

Are you saying your rights under Speedy Trial are going to be violated unless this conspiracy count is tried today?

MR. BERGMAN: No, wherein Mr. Korman's affidavit has -- he stated that the Government is ready to proceed itself on one count or three counts even though they could have obtained an indictment in Buffalo.[9/]

9/ Counsel for appellant Matanic mispoke. Mr. Korman's affidavit of December 3, 1976, which is alluded to, simply advances the government's position that all counts be tried together.

THE COURT: That doesn't make any sense.

MR. BERGMAN: It makes every bit of sense.

THE COURT: They can't take any arguments ready for trial or not.

MR. BERGMAN: This is a dilemma they have created themselves.

THE COURT: If they exercise their right they create a dilemma and the defendants should be released.

MR. BERGMAN: And the Speedy Trial Act provisions -- the provision is made that a defendant should be released within [90] days.

THE COURT: Unless there are excludable periods. Under our plan we provide the same exclusions set forth in the final plan are applicable to the contrary plan.

MR. BERGMAN: I would state Judge Zirpoli's guidelines state there shall be no exclusions.

THE COURT: He is only one man and we have taken this up with the Court of Appeals and they approved it. Do you want to go up to the Court of Appeals and say that's wrong?

MR. BERGMAN: That's our position.

THE COURT: All right. I have your position.

Once again, at no time did the government indicate that it was, apart from the pending appeal, ready from a trial standpoint to try the case in whole or in part.

December 20, 1976

The District Court denied the defendant's application to be released on bail of $1,000,000 as previously set by the Magistrate and continued by the District Court.

In addition, the Court summarily denied appellant's

application for release on the grounds that no trial had been held in ninety days since the arrest of appellant (Tr. December 20, 1976; pp. 19-20).

December 27, 1976

The District Court entered an order denying appellant Matanic's motion for release pursuant to 18 U.S.C. §3164.

ARGUMENT

Application of the Clear and Unambiguous Provisions of 18 U.S.C. §3164 Requires the Release of Appellant Matanic

The order of the District Court is grounded upon an erroneous interpretation of 18 U.S.C §3164. It is also grounded upon the misimpression that the government was ready for trial on December 6, 1976. More fundamentally, it should be reversed because it appears to be grounded on the premise that a defendant's readiness for trial is a precondition to both the government's readiness to try a case and the court's ability to preside over the trial.

This Court has already had occasion to deal with the provisions of 18 U.S.C. §3164. In United States v. Martinez, 538 F.2d 921 (2d Cir. 1976), it was found unnecessary to determine whether the excludable time periods in Section 3161(h) apply to Section 3164. In Martinez, the Court determined that the delay was, in the language of Section 3164(c), due to the "fault" of the defense (538 F.2d at 924), because of late filed defense motions and the eventual time consumed in disposing

of them.[10/] In the case at bar, however, the defendant Matanic's motions were timely filed in accordance with the District Court's preset schedule, which schedule was set down with the December 6 trial date in mind. In contrast to Martinez, it was the government that delayed in responding to defense motions.

The Court, therefore, is presented with the issue, undecided in Martinez, of whether the excludable time periods in Section 3161(h) apply to the "interim period" provided for in Section 3164. We contend that no excludable periods are applicable, but, assuming arguendo that they are, no such excludable period applies nor justifies the three month hiatus in which the government (albeit, ultimately with success) so tenaciously clung to its claim of venue in the Eastern District when, throughout, the defense was prepared to accept the venue of an indictment in the Northern District of New York.

In United States v. Tirasso, 532 F.2d 1299 (9th Cir. 1976), the Court held that a clear and unambiguous reading of Section 3164, as well as the legislative history of the Speedy Trial Act, mandated the inapplicability of the exclusions in Section 3161(h). The Court stated:

> "The language of section 3164 is straightforward. We find no ambiguity in its interpretation. Subsection (b)

10/ The Court in Martinez stated (538 F.2d at 924):

> "Our holding, in this regard, is based entirely on the peculiar facts of this case as applied under Section 3164(c)."

> provides that the trial of persons held in custody solely because they are awaiting trial must commence within ninety days following the beginning of such continuous detention. Subsection (c) provides that the failure to commence trial within the ninety day period, where such failure is not occasioned by the fault of the accused or his counsel, must result in an automatic review by the court of the conditions of release, and further that 'no detainee...shall be held in custody pending trial after the expiration of such ninety-day period....' Under the clear language of the statute the reason for delay is irrelevant, so long as it is not occasioned by the accused or his counsel.
>
> The legislative history, moreover, makes it clear that release of the defendant from custody, and nothing less, is the sanction for delay beyond the ninety-day period. 'Failure to commence the trial of a detained person under this section results in the automatic review of the terms of release by the court and, in the case of a person already under detention, release from custody.' S.Rep.No. 1021, 93d Cong., 2d Sess. reproduced in, 4 U.S. Code Cong. & Admin. News 7401, 7416 (1974)(emphasis added)."

See also, United States v. Orman, 417 F. Supp. 1126, 1127 (D.C. Col. 1976); contra, United States v. Masko, 415 F. Supp. 1317 (W.D. Wis. 1976).

Moreover, the holding in Tirasso is supported by the Committee on the Administration of the Criminal Law of the Judicial Conference of the United States. In its "Guidelines to the Administration of the'Speedy Trial Act of 1974,'", prepared under the supervision of District Judge Alfonso Zirpoli, the Committee stated: "It should be further noted that in the opinion of the Committee, the exclusions of §3161(h) do

not apply to §3164" (id., at p. 29). That conclusion is sound, given the fact that the remedy provided for in Section 3164, release, is far less drastic than the dismissal sanction which will ultimately be available under the Act for unexcused delay. In essence, release represents precisely the kind of middleground that is appropriate during the interim period of the Act. It is not illogical, therefore, that Congress did not apply the excludable periods to Section 3164. For, obviously, if applied with full vigor, the excludable periods would completely wipe away the prospect of any relief under Section 3164.

Even if the excludable periods set forth in Section 3161(h) are deemed generally applicable, they are of no help to the government. The appeal taken by the government was from a final order of dismissal; it was not "interlocutory" as provided for in the only applicable excludable period set out in Section 3161(h)(1)(D). Most importantly, though, there is simply no justification for the delay occasioned by the government's opposition to the venue dismissal motion and, thereafter, the substantial delay occasioned by the appeal.

The delaying effect of the government's stance on the venue motion was monumental in this case. Literally, all pre-trial procedures in the case came to a grinding halt. No motions, apart from bail, were heard and even the bail motion

was affected by the limbo status of the case.[11/] Significantly, appellant's application for the appointment of a CJA investigator was denied (even though the Court considered the request proper) because of the pendency of the appeal (App. "C").

Under those circumstances, it is no wonder that the appellant was not ready for trial on December 6 as to the capital counts in the indictment. The unaltered fact of the case, though, is that the government was not ready to try the case on December 6. It never made that representation to the court either orally or by notice of readiness. Given the government's nonreadiness it was hardly an answer for the government to urge the nonreadiness of the defense.

11/ At the December 20 bail application hearing before Judge Bartels, the Court candidly stated one of the motivating factors behind its decision to refuse to accept the bail proffered by the defendants (Tr. at p. 4):

> THE COURT: Let me say this to you, Mr. Tigar. Let's get right down to basics real fast. This is a very serious offense. There is now pending before the Court of Appeals a question of whether this case is before me at all.
>
> Now, it would be a very bizarre thing for me to pass on bail before that decision is made. Let's be practical and realistic. I have an obligation. I am not going to pass on any bail until that decision comes down. The case may not be before me at all; in which event, I would be substituting my judgment for the judgment of the court in Buffalo. We have to face facts, that's the status of the matter.

CONCLUSION

The order of the District Court should be reversed and appellant ordered released.

Dated: New York, New York
February 7, 1977

Respectfully submitted,

MARTIN ELEFANT, Esq.
16 Court Street
Brooklyn, New York 11201
(212)624-2240

PAUL B. BERGMAN, Esq.
25 Broadway
New York, New York 10004
(212)269-4900

Attorneys for Appellant
Petar Matanic

PROOF OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

IRENE COHEN , being duly sworn deposes and says:

1. I am over 18 years of age and am not a party to this action.

2. On February 9th 1977, I served two (2) of the foregoing Brief of Appellant upon

David G. Trager, United States
Attorney for the Eastern District of New York

by depositing two (2) true cop[y] [ies] thereof in an official depository under the exclusive care and custody of the United States Postal Service located at 25 Broadway, New York, New York each enclosed in a postpaid wrapper, which wrapper[s] [was] [were] addressed as follows:

Hon. David G. Trager
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Irene Cohen
Irene Cohen

Sworn to before me this
9th day of February 1977.

Notary Public

THOMAS [illegible]
Notary Public, State of New York
No. 03-6205016 Qual. in Bronx County
Certificate filed in New York County
Commission Expires March 30, 1978